83 - 592



No. -

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

LORI L. OSTROSKY, JULIANNE OSTROSKY, and HAROLD C. OSTROSKY,

*Appellants*

vs.

STATE OF ALASKA,

*Appellee*

**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA**

## JURISDICTIONAL STATEMENT

ROBERT H. WAGSTAFF
912 West Sixth Avenue
Anchorage, Alaska 99501
(907) 277-8611
*Counsel for Appellants*

## QUESTION PRESENTED

Does the State of Alaska's establishment in certain families of perpetual and exclusive commercial fishing rights to publicly owned salmon violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

No. -

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

LORI L. OSTROSKY, JULIANNE OSTROSKY,
and HAROLD C. OSTROSKY,

*Appellants*

vs.

STATE OF ALASKA,

*Appellee*

---

**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA**

---

## JURISDICTIONAL STATEMENT

---

## INTRODUCTION

This is an appeal from the Opinion of the Supreme Court of the State of Alaska announced July 19, 1983. The Alaska decision upheld the State of Alaska's "limited entry" fishing law which gives fortuitously selected persons and their heirs in perpetuity exclusive commercial access to salmon in the significant fisheries of Alaska. The only method by which a non-chosen person may gain access to such commonly held fish is through inheritance or purchase from an existing permit holder who is willing to sell. Although the initial issuance fee was negligible, permits in the fishery in question now sell for approximately $100,000. Appendix I, fn. 8.

This Jurisdictional Statement is submitted to show that the United States Supreme Court has jurisdiction of this appeal and a substantial question concerning the denial of the equal protection of the law is presented meriting plenary consideration.

## OPINION BELOW

The Opinion of the Supreme Court of the State of Alaska, not yet reported, appears in Appendix I.

## JURISDICTION

Notice of appeal and this Jurisdictional Statement were filed within ninety days of the Opinion date, Appendix II. This Court's jurisdiction is invoked under 28 USC 1257 (2). The Supreme Court of Alaska specifically ruled that the complained of restrictions of the Limited Entry Act, Alaska Statutes 16.43,010-380, do not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, Appendix I, p. 2a, 3a, 19a.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In 1973 the Alaska Legislature adopted Chapter 43 of Title 16 of the Alaska Statutes known as the Limited Entry Act. The Act specifies that after January 1, 1974 "no person may operate gear in the commercial taking of fishery resources without a valid entry permit or a valid interim use permit issued by the commission." A.S. 16.43.140. Only persons who previously had taken fish commercially as holders of gear licenses were eligible for entry permits. Although described as a "use privilege", A.S. 16.43.150 (3), after initial issuance the permit became a functional property right. The permits can be both inherited and sold:

A.S. 16.43.170(b) provides in pertinent part:

> [T]he holder of an entry permit may transfer his permit to another person or to the [Commercial Fisheries Entry Commission] upon 60 days notice of intent to transfer under regulations adopted by the commission. No sooner than 60 days nor later than 12 months from the date of notice to the commission, the holder of an entry permit may transfer his permit. If the proposed transferee, other than the commission, can establish present ability to participate actively in the fishery, the commission shall approve the transfer and reissue the entry permit to the transferee.

A.S. 16.43.150(h) provides:

> Upon the death of an entry permit holder, the permanent permit shall be transferred by the commission directly to the surviving spouse by right of survivorship unless a contrary intent is manifested. When no spouse survives, the rights of the decedent pass as part of his estate.

The permits are immune from attachment and execution. A.S. 16.43.150(g)(3).

The phenomena of transfer by inheritance and sale of the rights to the publicly owned fishery resource is referred to as

"free transferability."

Relevant portions of the Limited Entry Act are contained in Appendix III.

The Fourteenth Amendment to the Constitution of the United States provides:

> §1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Alaska residents Hank Ostrosky and his two daughters, Lori and Julianne, were convicted of the crime of commercially fishing salmon in the Bristol Bay of Alaska without being a holder of a limited entry permit. A.S. 16.43.360. Appendix I, p. 3a, 4a.[1]

The trial court granted post conviction relief to the Ostroskys, ruling that the Limited Entry Act was unconstitutional. Upon the State's appeal, the Ostroskys asserted *inter alia* that the Limited Entry Act denied them the equal protection of the law as provided by the Fourteenth Amendment to the Constitution of the United States. A majority of the Supreme Court of Alaska ruled otherwise. Appendix I.

The Ostroskys seek in this appeal to gain the opportunity for access to the natural resource of salmon which is reserved to the people for their common use. They wish only to be treated equally. They were not born into a family which has

---

[1]If probable jurisdiction is noted Harold Ostrosky may be represented by separate counsel.

been bestowed a limited entry permit, nor do they have the $100,000 necessary to buy a permit. The State of Alaska has created by its Limited Entry Act exclusive rights and special privileges in certain select families by giving these families perpetual rights in a publicly owned resource to the exclusion of all others forever. Alaska has thereby created an aristocracy of fishing families repugnant to the historical and fundamental egalitarian beliefs of the United States.

The majority of the Alaska Supreme Court stated:

> An entry permit is a government license having value issued to a limited number of people. As such it resembles a liquor license, or a permit to operate a trucking firm over a given route, or a utility franchise, or a broadcast license. While these privileges are both purchasable and inheritable, the fact that the poor cannot buy them is wealth discrimination only in the general sense that all prices discriminate in a society where wealth is distributed unequally. Further, that the poor seldom inherit such privileges is lineage discrimination only in the sense that laws permitting inheritance of anything of value are discriminatory . . . Since the wealth and lineage classifications presented here are not different from those which pervade our system of private property, we do not place the interest asserted by the Ostroskys—redistribution of entry permits based on a system free of these classifications—in an elevated position on the *Erickson* sliding scale. *It follows, of course, that the rational basis test is the appropriate standard for this federal constitutional claim.* Appendix I, p. 19a. (Emphasis supplied.)

The Ostroskys assert that naturally occurring fish are a public resource held in common for all, and as such are intrinsically distinguishable from alcohol or a utility franchise.

Indeed, former Chief Justice Rabinowitz in his dissent succinctly stated:

> I would hold that the state bears a high burden of showing the substantiality of its interests throughout our equal protection examination. Thus, I specifically

> disagree with the majority's conclusion that "[t]he individual interest asserted in appellants' challenge to the transferability provisions of the Act is not of high order."
>
> * * * * *
>
> The initial "grantees" [recipients of the limited entry permits] enjoy the ability to sell, assign, or pass on to their heirs their share of the gear fishery resource . . . Most importantly, the holder's right to the license never expires; the holder's heirs may hold it forever. Alternatively, they may sell it and realize a return based upon its value as an asset held in perpetuity. Under the free transferability system, none of the value of the resource is retained or ever returns to the State and the people.
>
> * * * * *
>
> Initial grantees were presented with a windfall at the expense of all other persons in the state. Public rights were extinguished in order to create exclusive private interests of sometimes enormous value. Under the equal protection clause the populace was divided into two categories: those who would receive this great boon from the State, and those who would forever lose their share in the resource unless they someday "bought it back" through the purchase of a gear license.

Appendix I, n. 3a, 22a, 23a. Justice Rabinowitz concluded as, it is submitted, this Court should:

> I am also in disagreement with the court's observations that the Limited Entry Act discriminates on the basis of wealth only in the manner that any price does, and I further disagree that liquor licenses and utility franchises furnish appropriate analogues. These assumptions overlook the constitutional status of the right allocated by the Limited Entry Act and the fact that here the relevant "free market" is one which was created legislatively and one which perpetuates and aggravates economic disparities.

Appendix I, p. 26a, n6.

The system by which only fortuitously selected families are given access to the publicly owned resource of fish is of a significantly high order as to violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. There are two classes of people created by the Alaska Limited Entry Act: Those families who are permitted to fish for salmon and those who are not. All Alaska residents should have equal opportunity for access to a State owned and controlled resource which is held in common for all the people. Under the present scheme opportunity for access to this resource can be gained only by inheritance or by purchase. This scheme of limited entry creates a special privilege and exclusive perpetual right to fish among a limited and fortuitous class of families in direct violation of the Fourteenth Amendment to the Constitution of the United States. The present scheme of limited entry removes salmon from common use and monopolizes them to an exclusive few families forever.

## THE QUESTION PRESENTED IS SUBSTANTIAL

In *Reetz v. Bozanich*, 397 U.S. 82 (1970), this Court reversed a three judge District Court panel which had held a similar Alaska limited entry scheme invalid on equal protection grounds, remanding for the purpose of allowing the State Court to first determine the State constitutional issues:

> A state court decision here, however, could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship. *Ibid.* p. 86-87.

This case is the functional culmination of that remand. The highest court of the State of Alaska has now determined that such a creation of private property rights in a publicly owned fishery does not violate the Constitution of the State of Alaska or the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The three judge panel in *Bozanich*, 297 F. Supp. 300 (D. Alaska 1969), described the similarly offensive regulation as establishing "monopolistic trade guilds", at 307, and its effects as follows:

> The only persons that can presently qualify for net gear licenses are those already vested with the local privilege. To receive a license for a particular fishery, one must have held a gear license in the same region in a year since 1965 or have held a commercial fishing license in that region for any three years since 1960. An aspiring commercial licensee wishing to participate in salmon fishing may work for a locally licensed employer for three years or may fish for himself but without the necessary net gear to catch salmon. Thus, if an outsider wished to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years possessed the right to fish in the area . . . Under this scheme, entry into the salmon fishing industry is controlled not by the State, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire.

297 F. Supp. 304-305, footnotes omitted.

Under the Act at bar, a closed class consisting of the original permits as issued to the then existing fishermen and their heirs are given the power to choose who can fish and the price to be paid.

This Court has long recognized that ever since Roman times animals *ferae naturae* have been considered part of the *res nullius*, subject to control by the sovereign. Fish and game are the common property of all citizens and the government acts as trustee exercising "ownership" for the benefit of its citizens. The most extended exposition of this precept appears in the majority opinion in *Geer v. Connecticut*, 161 U.S. 519 (1896).

In *Toomer v. Witsell*, 334 U.S. 385 at 402, (1948), this Court said of fish: "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to

preserve and regulate the exploitation of an important resource." The Court held that the ownership theory such as it may exist does not allow a state to exercise its power in violation of the Constitution of the United States.

In the more recent case of *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), this Court again discussed State ownership of fish:

> In any event, '[t]o put the claim of the State upon title is' in Mr. Justice Holmes' words, 'to lean upon a slender reed.' *Missouri v. Holland*, 252 U.S. 416, 434 (1920). A State does not stand in the same position as the owner of a private game preserve, and it is pure fantasy to talk of 'owning' wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, have title to these creatures until they are reduced to possession by skillful capture. *Ibid; Geer v. Connecticut, supra*, 161 U.S. at 539-540 (Field, J. dissenting). The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' *Toomer v. Witsell*, 334 U.S. 385,402 (1948); see also *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 420-421 (1948). *Under modern analysis the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.* As we have demonstrated above, Virginia has failed to do so here. *Ibid.* 284 (Emphasis supplied).

*See also, Kleppe v. New Mexico*, 426 U.S. 529 (1976). A state's asserted control over its resources does not preclude the proper exercise of federal power. Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978) citing *Douglas v. Seacoast Products, Inc.* 431 U.S. 265 (1977).

The Supreme Court of the State of Washington rejected a similar scheme in 1936 in *State v. Huse*, 59 P.2d 1101 (Wa. 1936). The court found the state owned the fish in its waters

in its proprietary capacity and held title as trustees for all people of the state for the common good. Any regulations made for the use of the common property, however, must bear equally on all persons. The provisions of the infirm Washington law forbidding issuance of license to take salmon by gill net except to those holding such licenses previously was held invalid as creating an arbitrary classification and conferring special privileges. The court noted:

> Respondent begins with the premise that one of the fundamental objects sought by the act was the conservation of the State's supply of food fish. This may be conceded. Respondent then advances, as a reason for the discrimination and classification, the fact that, at the time of the adoption of the initiative measure, it was recognized that there was a large number of people in the state whose sole means of livelihood was gill netting within the prohibited area, and that it would have been a grave injustice to deprive them of their livelihood; hence by the provisions of section 4 of the act, such persons were to be permitted to follow their accustomed vocation during the remainder of their lives, while all others were to be prohibited. The argument possesses some measure of plausibility as indicating a beneficient complaisance on the part of the sovereign state toward certain of its citizens suddenly embarrassed by the quick and decisive turn of things. But the argument, we think, is not legally sound, and its weakness is, in our opinion, demonstrable.
>
> *In the first place as already stated, the state holds title to the fish within its waters in trust for all its people and for the common good, not simply for a limited few nor for the good of a small minority. The state cannot dispose its bounty in favor of particular persons and withhold it from all others who have equal right or claim.*
>
> * * * * * *
>
> The regulation, if it may be so called, is founded upon mere fortuitous circumstances and makes a gratuitous

selection of individuals who shall enjoy the use of common property to the exclusion of all others. (Emphasis supplied.) *Ibid.* 1105.

The equal protection problems the Washington Supreme Court identified in 1936 and the situation in Alaska today are identical. Because of fortuitous circumstances those who were fishing in the past and their succeeding generations or designees are allowed to fish in the future in perpetuity.

The original issuance of limited entry permits required that the applicants be ranked according to the degree of economic dependence upon the fishery, the extent of past participation, the availability of an alternative occupation, and the investment in gear and vessel. A.S. 16.43.250. As questionable as these original issuing criteria are, any subsequent transfers by inheritance or windfall purchase bears no relationship to these stated purposes.

Three standards of review are commonly utilized in cases involving the equal protection clause of the Fourteenth Amendment to the United States Constitution. Where suspect classifications or fundamental rights are involved differential treatment will be upheld only if the purpose of enactment furthers a "compelling State interest" and the enactment itself is necessary to the achievement of the interest. Second, where classifications are based on gender or birth, the purpose of the enactment must be "important", and the means used to accomplish that purpose must be fairly and substantially related to its accomplishment. In cases not involving suspect classifications, infringement of fundamental rights, or classifications based on gender or legitimacy, differential treatment must be based on governmental interest which is legitimate and the act must be rationally related to its achievement. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *Craig v. Boren*, 429 U.S. 190, 197-198 (1976); *Lalli v. Lalli*, 439 U. S. 259, 265 (1978).

The Limited Entry Act at the very least infringes on a "sensitive and fundamental personal right." The importance of the right to engage in a chosen occupation was recognized by this Court in *Toomer v. Witsell, supra; Hicklin v. Orbeck*

437 U.S. 518 (1978) and *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, (1978). The wealth and lineage based discriminations in the Limited Entry Act infringes upon the fundamental and sensitive right for an opportunity to engage in the occupation of commercial fishing as well as the right for democratic access to a publicly owned resource.

This is not a case where a statute is being attacked because it involves a rational distinction made with less than mathematical exactitude. Limited entry makes arbitrary distinctions that not only deny the equal protection of the law but bear no relationship to the stated purposes of the Act. Nor is it a statute which is attempting to implement a program step by step. This differentiates the Limited Entry Act from the economic regulations upheld in *City of New Orleans v. Dukes*, 427 U.S. 297, (1976).

*New Orleans* dealt with an initial allocation of the right to sell hot dogs in the *vieux carre*. Hot dogs are not a naturally occurring publicly owned resource. Even assuming comparison to the initial allocation of limited entry permits, *New Orleans* doesn't speak to the transferability of those permits. The hot dog vendors allowed to continue in business were not allowed to sell or devise that right.

The decision contemplated the normal meaning of grandfather rights as a gradual phasing out of a nonconforming use. That is not the intent of the Limited Entry Act. Fishing is meant to continue at the present level. There is no phasing out. There is only the creation of perpetual and exclusive fishing rights within certain families to the exclusion of others.

In *Jimenez v. Weinberger*, 417 U.S. 628 (1974), this Court struck down a Social Security Act distinction between legitimate and illegitimate children. The Court cited *Weber V. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), for the proposition that:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate

> child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility of wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parents. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise." *Id.* at 175-176.

The Alaska Limited Entry Act discriminates in a similar fashion as to status by birth. There are some persons who by accident are born into families which will have access to salmon and others born into families who will never have the opportunity for such access.

The concurrence of Justices Brennan, Marshall, Blackman, and Powell in *Zobel v. Williams*, 102 S. Ct. 2309 (1982), as expressed in footnote 2 appropriately comments:

> The American aversion to aristocracy developed long before the Fourteenth Amendment and is, of course, reflected elsewhere in the Constitution. See art I §9 cl. 8 ("No title of Nobility shall be granted by the United States."). See also Virginia Bill of Rights (1776), Rutland. The Birth of the Bill of Rights, App. A ("no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services").

The Alaska Limited Entry Act creates an aristocracy of fishing families who have exclusive and separate emoluments and privileges in the publicly owned resource of free-swimming salmon. Limited entry stands in direct conflict with the Constitution of the United States.

## CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

DATED this _____ day of September, 1983, at Anchorage, Alaska.

ROBERT H. WAGSTAFF
*Attorney for Appellants*

*Robert H. Wagstaff*
912 West Sixth Avenue
Anchorage, Alaska 99501
(907) 277-8611

# APPENDICES

# APPENDIX I

NOTICE: This opinion is subject to formal correction before publication in the *Pacific Reporter*. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

## IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA

*Appellant,*

v.

LORI L. OSTROSKY, JULIANNE OSTROSKY and HAROLD C. OSTROSKY,

*Appellees.*

File No. 6336

OPINION

[No. 2702-July 19, 1983]

---

LORI L. OSTROSKY, JULIANNE OSTROSKY,

*Cross-Appellants,*

v.

STATE OF ALASKA,

*Cross-Appellee.*

File No. 6373

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Victor D. Carlson, Judge.

Appearances: John B. Gaguine, Assistant Attorney General; Jonathan K. Tillinghast, Assistant Attorney General; Wilson L. Condon, Attorney General, Juneau for Appellant/Cross-Appellee.

Frederick Paul, Paul, Johnson, Paul & Riley, Seattle, for Harold C. Ostrosky. Robert H. Wagstaff, Wagstaff, Middleton & Pope, Anchorage, for Lori and Julianne Ostrosky.

Before: Burke, Chief Justice, Rabinowitz, Matthews and Compton, Justices.

MATTHEWS, Justice.
RABINOWITZ, Justice, dissenting.

The issues presented in this case are:

(1) whether the entry restrictions of the Limited Entry Act, AS 16.43,010-.380, violate the following provisions of the Alaska Constitution:

(a) article VIII, section 3, which reserves naturally occurring fish to the people for common use;

(b) article I, section 1, which guarantees all persons equal rights and opportunities;

(2) whether the transferability provisions of the Limited Entry Act, under which entry permits can be sold or inherited, AS 16.43.150(h) and .170 violate

(a) article VIII, section 15 of the Alaska Constitution, prohibiting exclusive rights or special privileges of fishery;

(b) article VIII, section 3 of the Alaska Constitution, preserving naturally occurring fish to the people for common use;

(c) article I, section 1 of the Alaska Constitution, guaranteeing all persons equal rights and opportunities.

(d) the equal protection clause of the fourteenth amendment to the United States Constitution.

The superior court answered the questions designated above as 2 (a) and (c) in the affirmative. We answer all of them in the negative, and reverse.

## I. FACTS

When Harold Ostrosky and his two daughters, Lori and Julianne, operated salmon drift net gear in Bristol Bay without entry permits they were cited for illegal possession of commercially caught fish,[1] and illegal commercial fishing.[2]

The three went to trial and were convicted. Mr. Ostrosky was fined $10,000 with $9,000 suspended, and Lori and Julianne were each fined $5,000 with $4,500 suspended. In addition, the boat on which they were fishing, the Lori K.O., was ordered forfeited to the state, with the forfeiture suspended for two years.

Lori and Julianne filed an application for post-conviction relief, claiming their convictions were invalid because the provisions of the Limited Entry Act regarding transfer of entry permits violated state and federal constitutional requirements.

---

[1] 20 AAC 05.110 provides:

> PERMIT REQUIRED TO POSSESS FISH OR SHELLFISH. (a) It is unlawful for any person to possess, within water subject to the jurisdiction of the state, any fish or shellfish, taken for a commercial purpose, aboard a fishing vessel commonly used for taking that species of fish or shellfish unless the person has in his possession a valid interim-use or entry permit card allowing him to take the fish or shellfish in his possession with the gear with which the vessel is equipped unless waived by the commission for good cause.
>
> (b) As used in this section, a "commercial purpose" includes any sale, purchase, trade, gift, or any portion of a commercial transaction.

[2] 20 AAC 05.100 provides:

> PERMIT REQUIRED TO OPERATE GEAR. (a) It is unlawful for any person to operate gear, within water subject to the jurisdiction of the state, for the commercial taking of any fishery resource without a valid interim-use or entry permit card issued by the commission authorizing that person to operate that type of gear in that fishery unless waived by the commission for good cause. To be valid, an interim-use permit or entry permit card issued by the commission must be signed in the space provided by the person named as the card holders [sic].

Mr. Ostrosky joined in this position. The superior court held that the transferability provisions of the Limited Entry Act violate article VIII, section 15 of the Alaska Constitution, prohibiting exclusive rights of fishery, and article I, section 1 of the Alaska Constitution, guaranteeing all persons equal rights and opportunities.[3] The court granted post-conviction relief to the Ostroskys.

---

[3] The court's decision relating to these issues states as follows:

> The defendants' state constitutional challenge involves two related arguments: first, that the Act's inheritance and transfer provisions create in permit holders an "exclusive right . . . of fishery" in violation of Article VIII, section 15, and second, that these provisions create a wealth and familial classification in violation of the Article I, section 15 guarantee of equal treatment.
>
> Article VIII, section 15, as amended in 1972, provides:
>
> No exclusive right of fishery. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the state. This section does not restrict the power of the state to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the state.

The Act was passed under the authority of this constitutional provision. The obvious tension between the ban on "exclusive rights or privilege of fishery" on the one hand and the grant of power to "limit entry into any fishery . . . to prevent economic distress among fishermen and those dependent upon them for a livelihood . . ." on the other hand is reflected in the Act which has as its purpose limitation of entry without "unjust discrimination." AS 16.43.010(a). The elaborate ranking system for the award of initial free permits, AS 16.43.200-270, 20 AAC 05.600-670, represents the legislative accommodation of this tension. This initial allocation system has been held to be constitutional. *Apokedak, supra.*

An analysis of the Act in terms of Article VIII, section 15 is not necessary, however, since the issue is subsumed in the equal protection analysis. Article VIII, section 15 gives specific expression of the facts which go into the equal protection analysis. In State v. Erickson 574 P.2d 1 (Alaska 1978), the court adopted the single equal protection test.

> Initially, we must look to the purpose of the statute, viewing the legislation as a whole, and the circumstances surrounding it. It must be determined that this purpose is legitimate, that it falls within the police power of the state. Examining the means used to accomplish the legislative objectives and the reasons advanced

The state appealed to the court of appeals which certified the appeal as appropriate for transfer to this court pursuant to AS 22.05.015(b) and Alaska R. App. P. 408(b). We accepted the certificate.

*(Footnote Continued)*

> therefor, the court must then determine whether the means chosen substantially further the goals of the enactment. Finally, the state interest in the chosen means must be balanced against the nature of the constitutional right involved. 574 P.2d at 12.

Article VIII section 15 is the declaration by the people that the purpose of limiting entry into the fisheries is within the police power of the state, provided no exclusive right of fishery is created. The real question presented is whether the means by which the state limits entry bears a fair and substantial relation to the Act's purposes.

The nature of the right involved has been addressed by the court in *Apokedak* as an ". . . important right to engage in economic endeavor, which in some cases may involve the right to employment in the industry." 606 P.2d at 1266 (footnote omitted)..

The purposes of the Act identified by the Supreme Court in *Apokedak* are: (1) enhancing the economic benefit to fishermen since too many involved in the industry prevented those relying on fishing for a livelihood from securing adequate remuneration; (2) conserving the fishery; (3) avoiding unjust discrimination in the allocation of a limited number of entry permits; and (4) administrative convenience. 606 P.2d at 1255. Does allocation of entry permits by the market and inheritance bear a fair and substantial relation to these legislative purposes?

The particular means of allocating permits is irrelevant to conservation of the fishery. That purpose is accomplished by controlling the catch. The allocation system is, therefore, irrelevant to achievement of purpose.

The inheritance and transferability provisions of the Act clearly serve the purpose of promoting administrative convenience. Allowing the market and rules of descent and distribution to allocate permits avoids the necessity of a case by case ranking which was required for the initial award of permits. However, the purpose of promoting administrative convenience cannot alone outweigh the important right impinged by the statutory classification. 606 P.2d at 1266, footnote 45.

Allocation of permits by the market does not serve the purpose of avoiding unjust discrimination among those seeking permits. On the contrary, this system of allocation results in an unjust discrimination. Assuming a willing seller, the availability of permits is based solely on ability to pay. As noted by Justice Dimond in his concurring opinion in *Apokedak*:

> This situation has the effect of creating another classification: on the one hand, the person with abundant financial resources, and

## II. CONSTITUTIONALITY OF ENTRY RESTRICTIONS

Although the superior court struck down the Limited Entry Act on the grounds that its transferability provisions violate the Alaska Constitution, the Ostroskys have offered additional grounds for holding the Act unconstitutional. We consider these because a judgment may be affirmed on grounds different from those relied on by the trial court. *Moore v. State*, 553 P.2d

*(Footnote Continued)*

> on the other, a person of considerably more modest means. It seems to me that the Act is having the effect of favoring the well-to-do over the poor. In my opinion, this discrimination is basically unfair or unjust, and does not conform to the principle in article I, section 1 of our Constitution which requires equality of treatment of persons in the state. 606 P.2d at 1268-69.

In the initial ranking an applicant was awarded points by demonstrating the economic hardship which would result from exclusion from the fishery. AS 16.43.250. As the system now operates, wealth is the sole determinative factor. The provisions to avoid unjust discrimination in the initial award of permits have been stood on their head. Clearly, the market allocation of permits bears no relation, substantial or otherwise, to the just allocation of permits.

The state analogizes the market allocation of permits to the sale of alcoholic beverage licenses and subsequent sales of homestead lands. I find neither analogy compelling. Of principal importance is the fact that the people enjoy access to the state's fisheries which does not pertain in the case of alcohol. See Article VIII, sections 3 and 15, Constitution of Alaska. Since the "right" to hold a liquor license does not occupy a privileged constitutional position, the equal protection analysis is quite different. With regard to land sales, it is true that there are some superficial similarities, since subsequent allocations are by the market and inheritance. The analogy breaks down, however, because of two important differences. First, land, as property, has some intrinsic worth; and the allocation process bears a direct relation to this intrinsic value. The limited entry permit is a license, not property, AS 16.43.150, and has no intrinsic value. The market for limited entry permits is an entirely artificial creation of the allocation process. Second, the law regarding ownership and transfer of land is the product of historical conditions antedating the creation of the United States of America. The Constitutions of the United States and Alaska recognize this historical legacy and have been interpreted with reference to it. The Act is of recent vintage and the legislature explicitly avoided endowing the permit with the attributes of a property right. AS 16.43.150(e).

It may be argued that the allocation of permits by the market is necessary to allow the permit holder to recoup his investment in vessels and gear.

8, 21 (Alaska 1976); *Ransom v. Haner*, 362 P.2d 282, 285 (Alaska 1961).

We will first consider Harold Ostrosky's contentions concerning the validity of the entry restrictions of the Act. Those restrictions, in general, provide that no one can be the primary operator of commercial fishing gear without an entry permit. There are only a limited number of entry permits for each particular fishery. Following the implementation of the Act in 1973, entry permits were issued to those who had previously held

*(Footnote Continued)*

However, market allocation bears only a tenuous relation to this purpose. First, the market price of the permit is dependent on the type of permit and the location of the fishery, and is not directly dependent on the vessel and gear owned by the transferor. Second, investment in vessels and gear is, or should be, a factor in the permit holder's decision to leave the fishery. The capital investment can be amortized over the life of the permit, the length of which is dependent on the holder. Provisions for emergency transfer of the permit mitigate any harshness due to illness or death of the holder.

Th Act has as a purpose prevention of economic distress among fishermen and their dependents. A sizable capital investment is required to engage in commercial fishing. This investment was recognized in the initial ranking of applicants for free entry permits. AS 16.43.250(a)(1). See Younker v. Alaska Commercial Fisheries Entry Commission, 598 P.2d 917 (Alaska 1979). Vessels and gear unaccompanied by a permit to operate them are of relatively little value. The state limitation on entry to the fishery, also limited the market for vessels and gear. The Act recognizes the tie between permits and capital in AS 16.43.170(c) and AS 16.43.310-.320 under the buy-back programs both the permits and vessels and gear are purchased by the state.

Applying the *Erickson* test and considering the goal to be obtained, protection of the investment, and the means selected, allocation by the market, and in light of the important right impinged, I find the Act does not bear a fair and substantial relation to the statutory purposes. I further find that the inheritance and transferability provisions of the Act have the effect of causing, rather than avoiding, unjust discrimination, among those seeking permits. I find the Act unconstitutional under Article I, section 15 of the Alaska Constitution, and hold that the defendants cannot be penalized for failure to possess the required permits, therefore necessitating a reversal of their convictions.

Ostrosky v. State No. 3 AN-80-7652 Criminal (Alaska Super., August 14, 1981) (footnote omitted).

gear licenses on a grandfather rights basis subject to detailed statutory and regulatory guidelines. *See generally Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255 (Alaska 1980). Commercial fishermen who had been crew members but not gear license holders were not eligible to receive entry permits in the initial allocation. AS 16.43.260(a). Under the Act, crew members need not have an entry permit as long as the holder of the entry permit is present when gear is operated. AS 16.43.140(b).

A. *Article VIII, Section 3.*

Article VIII, section 3 of the Alaska Constitution provides:

> Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Until it was amended in 1972, article VIII, section 15 provided:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

In 1972 an additional sentence was added to section 15:

> This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Harold Ostrosky argues (a) that section 3 of article VIII prohibits entry limitations and (b) that the prohibition of section 3 has not been affected by the 1972 amendment to section 15. The first part of this argument is supported by judicial authority. In *Bozanich v. Reetz*, 297 F. Supp. 300, 306 (D. Alaska 1969), a three judge federal court held that a precursor of the present limited entry system, chapter 186, SLA 1968, was unconstitutional under both section 3 and section 15 of article VIII. This decision was vacated by the United States Supreme Court on abstention grounds, *Reetz v. Bozanich*, 397 U.S. 82, 25 L.Ed.2d 68 (1970). The parties then litigated the same question in state superior court, which held that section

3 and section 15 of article VIII, as well as section 1 of article I, prohibit limited entry.[4]

Like the courts in the *Bozanich* cases, we have difficulty squaring the section 3 reservation of fish to the people for common use with a system which grants an exclusive right to fish to a select few who may continue to exercise that right season after season. We accept, therefore, at least for the purposes of this case, the proposition that limited entry is inconsistent with the command of article VIII, section 3.

We proceed to an examination of the second part of Harold Ostrosky's argument, namely that the amendment to article VIII, section 15 did not eliminate the prohibition on limited entry implicit in article VIII, section 3. This argument is textually correct, for the language of the amendment only refers to section 15. However, the conclusion is inescapable that the purpose of the amendment was to authorize, so far as the state constitution is concerned, a limited entry system. No other purpose seems reasonably possible.

Our conclusion is supported by the history of the 1972 amendment. As introduced by the Governor and as passed by the Senate, the language of the proposed amendment was stated in the affirmative: "The state may restrict entry to any fishery . . ."[5] As so written, there would be no question but that limited entry would be constitutional as a matter of state constitutional law, despite any contrary provisions of the state constitution. The House Resources Committee changed the language to its present negative form. The Committee report explaining this action makes it clear, however, that the Committee did not intend to constrict in any way the sweep of the amendment. Thus, the report states with approval the purpose of the amendment: to "give the state the power to restrict entry into a fishery for certain public purposes." The report continues:

---

[4] *Bozanich v. Norenberg*, No. 70-389 Civil (Alaska Super., 1st Dist., Juneau, March 8, 1971) per Judge Carlson.

[5] 1971 Senate Joint Resolution No. 10.

> In his testimony to the committee the Attorney General, Mr. Havelock, suggested that an amendment of this nature is essential if Alaska is to ever have an economically healthy fishing industry. For more than a decade fisheries economists have been calling for such an institutional change, and over the past few years the fishermen themselves have come to recognize that this amendment, though no panacea, is an essential first step to revitalization of the fishing industry in Alaska.

After so endorsing limited entry the report proceeded to explain the Committee's substituted language:

> After carefully studying the new language proposed in the Senate Resolution, your committee has adopted a substitute which alters the wording of the amendment in three small but signficant ways.

Only the first change concerns the change from a positive to a negative form of expression. The report continues:

> In the case of *Reetz v. Bozanich,* the U.S. Supreme Court held that a statute limiting entry into a fishery creates an exclusive right of fishery. As a consequence,the meaning of the new language, which the Senate proposes to add as a second sentence in Section 15, is not as clear as it could be. In order to eliminate any confusion or ambiguity we have altered this new language to show that the state's power to limit entry is a specific exception to the "exclusive right" prohibition.

2 House Journal 760-61 (1971).

Thus, the purpose of the House Committee in altering the affirmative language of the Senate Joint Resolution to the negative form which found its way into the amendment was to clarify perceived ambiguities, not to restrict the meaning of the Senate Joint Resolution.

We conclude that the purpose of the amendment to article VIII, section 15 was to grant the state the power to impose a limited entry system in any fishery, notwithstanding any state constitutional provisions otherwise prohibiting such

a system. Therefore, Harold Ostrosky's argument that the entry provisions of the Act violate article VIII, section 3 of the Alaska Constitution must fail.

B. *Article I, Section 1.*

Article I, section 1 of the Alaska Constitution states the principle that "all persons are equal and entitled to equal rights, opportunities, and protection under the law . . ." Harold Ostrosky's argument that the entry restrictions of the Act violate this clause is similar to his argument relating to article VIII, section 3. He argues that the superior court in the second *Bozanich* case held that the 1968 precursor to the present Act violated article I, section 1, that this conclusion was correct, and that article I, section 1 was not amended by implication by the 1972 amendment to article VIII, section 15. For the reasons we have expressed above with respect to the argument concerning article VIII, section 3, this argument is rejected. The authority to impose some limited entry system became in 1972 a part of Alaska's constitution. The amendment granting that authority cannot, in turn, be challenged as unconstitutional under preexisting clauses in the same document.[6]

---

[6] Harold Ostrosky raises two other points. (1) He argues that even if a limited entry program is constitutionally permissible, the current act does not further the purposes expressed in the amendment to article VIII, section 15 and is therefore invalid. However, the role of the judiciary is not to invalidate acts of the legislature because in retrospect the acts have arguably failed to achieve the purposes for which they were enacted. Rather our role is to examine whether the legislature could reasonably have expected that the Limited Entry Act would advance the purposes of article VIII, section 15. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, 66 L.Ed. 2d 659, 668-69, reh'g denied, 450 U.S. 1027, 68 L.Ed. 2d 222 (1981); Vance v. Bradley, 440 U.S. 93, 111-12, 59 L.Ed 2d 171, 184-85 (1979). No argument has been made that this test is not satisfied, nor do we believe that any such argument would be reasonable. As we stated in Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1263 (Alaska 1980):

> The overall economic and conservation goals of the Act [which are the same as the constitutional goals] are met by limiting the number of permits.

## III. CONSTITUTIONALITY OF TRANSFERABILITY PROVISIONS

AS 16.43.170(b) provides in pertinent part:

> [T]he holder of an entry permit may transfer his permit to another person or to the [Commercial Fisheries Entry Commission] upon 60 days notice of intent to transfer under regulations adopted by the commission. No sooner than 60 days nor later than 12 months from the date of notice to the commission, the holder of an entry permit may transfer his permit. If the proposed transferee, other than the commission, can establish present ability to participate actively in the fishery, the commission shall approve the transfer and reissue the entry permit to the transferee.[7]

AS 16.43.150(h) provides:

> Upon the death of an entry permit holder, the permanent permit shall be transferred by the commission directly to the surviving spouse by right of survivorship unless a contrary intent is manifested. When no spouse survives, the rights of the decedent pass as part of his estate.

Lori and Julianne Ostrosky do not attack the entry restriction aspect of limited entry. Instead, they contend the above transferability provisions are unconstitutional. Their argument is that these provisions exclude those who do not have sufficient assets to purchase an entry permit and who have not inherited one. This, they contend, amounts to an unintentional

*(Footnote Continued)*

(2) He argues that the Limited Entry Act is a burden on interstate commerce in violation of the commerce clause of the Unted States Constitution. The argument is so cursory that it is incomprehensible to us. Accordingly, we do not consider it. *See* State v. O'Neill Investigations, Inc., 609 P.2d 520, 528 (Alaska 1980); Lewis v. State, 469 P.2d 689, 691 n.2 (Alaska 1970); Pedersen v. State, 420 P.2d 327, 330 nn.4-5 (Alaska 1966).

[7] The present ability requirement is not a stringent one. It requires only that "the person is physically able to harvest fish in the fishery and has reasonable access to commercial fishing gear of the type utilized in that fishery." 20 AAC 05.770(5).

classification based on wealth and lineage. They also argue that the transferability provisions themselves create an exclusive right or special privilege of fishery barred by the first sentence of article VIII, section 15 and by the common use clause, article VIII, section 3. They suggest that a transfer system meeting the requirements of the constitution would be one in which a permit would revert to the state when the permit holder dies or is no longer using it. Reissuance could be accomplished either under a type of apprenticeship system, emphasizing past participation in commercial fishing as a crewmember, or a lottery, or a combination of both. For convenience we will refer to the existing system as "free transferability" and to the type of system proposed by Lori and Julianne Ostrosky as a "reversion/reissuance system."

A. *Article VIII, Sections 3 and 15—The Least Exclusive Alternative Contention.*

One interesting argument made by Lori and Julianne Ostrosky is based on the tension between article VIII, section 3 and the first sentence of article VIII, section 15 on the one hand, and the amendment to section 15 on the other. This argument concedes that some limited entry system is constitutionally permissible because of the amendment. However, since the common use clause of section 3 and the no exclusive right of fishery clause of section 15 remain in the constitution, the premise of the argument is that whatever system of limited entry is imposed must be one which, consistent with a feasible limited entry system, entails the least possible impingement on the common use reservation and on the no exclusive right of fishery clause. The argument concludes that free transferability does not entail the least possible impingement on the anti-exclusionist values which these provisions reflect.

Since "[i]t is a well accepted principle of judicial construction that, whenever reasonably possible, every provision of the Constitution should be given meaning and effect, and related provisions should be harmonized," *Park v. State*, 528 P.2d 785, 786-87 (Alaska 1974), the premise of this argument is logical. However, the conclusion that free transferability is more exclusive than a reversion/reissuance system has not been demonstrated.

Given a finite number of permits for each of the several fisheries subject to the Act, it is not evident that free transferability constitutes a greater impingement on the nonexclusive, common use goals of article VIII than a system of reversion and reissuance. In a system of free transferability there will be those who are unable to afford a permit.[8] However, in a reversion and reissuance system where reissuance is by lottery there will be those who are excluded by chance. Similarly, if reissuance is based on an apprenticeship system there will be those who are excluded because, while they may be fit enough to fish, they are not hired by existing permit holders as crew members because stronger and younger help is available, or for other reasons. Exclusion from participation as a gear license holder in a fishery is not more violative of the common use or the no exclusive right of fishery clauses because it is based on one's financial rather than physical standing, or on the laws of chance.[9] We thus reject the Ostroskys' contentions that free transferability violates article VIII, sections 3 and 15.

B. *Equal Protection*

Three standards of review are commonly utilized in cases involving the equal protection clause of the fourteenth amendment to the United States Constitution. First, where suspect classifications (i.e., those based on race, national origin, or alienage) or fundamental rights (e.g., voting, litigating, or the

---

[8] For the last quarter of 1981 the average price for a permit was approximately $50,000. For some fisheries average prices were much higher, ranging upwards to $100,000. Commercial Fisheries Entry Commission, 1981 Quarterly Permit Price Information (1982). Permits are, however, often transferred. In each of the years 1980 and 1981 about 1,000 or 10% of the existing permits, were transferred, primarily by sale. Commercial Fisheries Entry Commission, Commercial Fisheries Entry Permit Transfers, 1980 and 1981 (1982).

[9] The system of termination of permits after a specified term of years during which the holder "may be expected to recoup his investment in gear and vessel and realize a reasonable return," suggested by the dissent entails permit reissuance, probably on the basis of a lottery. The reissuance aspect of such a system, if based on a lottery, would be subject to the comments which we have made above. Likewise, if reissuance were based on

exercise of intimate personal choices)[10] are involved, differential treatment will be upheld only when the purpose of the enactment furthers a "compelling state interest" and the enactment itself is "necessary" to the achievement of that interest. This is often called the strict scrutiny standard.[11] Second, where classifications are based on gender or illegitimacy, the purpose of the enactment must be "important," and the means used to accomplish that purpose must be "fairly and substantially" related to its accomplishment. *Craig v. Boren*, 429 U.S. 190, 197-98, 50 L.Ed. 2d 397, 407 (1976), *reh'g denied*, 429 U.S. 1124, 51 L.Ed. 2d 574 (1977); *see also Lalli v. Lalli*, 439 U.S. 259, 265, 58 L.Ed. 2d 503, 509 (1978). This is regarded as an intermediate level of review. Third, in cases not involving suspect classifications, the infringement of fundamental rights, or classifications based on gender or illegitimacy, differential treatment must be based on a governmental interest which is "legitimate," and the enactment must be "rationally" related to its achievement.[12] In our discussion of federal equal protection we have called this the rational basis test. *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976).

---

*(Footnote Continued)*

a type of apprenticeship system, our comments above would also be applicable. Additionally, such a system would be of questionable feasibility. For most fishermen commercial fishing is a career choice. It would work an obvious hardship on a gear license holder whose permit expired after, for example, ten years, to then force him out of his chosen career. This would be similar to restricting a license to practice law or medicine to a limited period after which the practitioner would have to make way for others and embark upon a second carer. Further, the system suggested by the dissent would tend to lock a fisherman into owning only one vessel during his fishing career. It would be difficult for a fisherman having only three or four years left on his license to finance the acquisition of a new vessel. Moreover, the fixed termination aspect of such a system would tend to foster exploitation, rather than conservation, of the fisheries.

[10] L. Tribe, American Constitutional Law § 16.7 (1978).

[11] *See, e.g.*, Kramer v. Union Free School District, No. 15, 395 U.S. 621, 626-27, 23 L.Ed 2d 583, 589 (1969).

[12] Harris v. McRae, 448 U.S. 297, 324, 65 L.Ed 2d 784, 809 *reh'g denied*, 448 U.S. 917, 65 L.Ed. 2d 1180 (1980).

The approach we have taken under the state equal protection clause is somewhat different. In contrast to the rigid tiers of federal equal protection analysis, we have postulated a single sliding scale of review ranging from relaxed scrutiny to a strict scrutiny. The applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.[13] As legislation burdens more fundamental rights, such as rights to speak and travel freely, it is subjected to more rigorous scrutiny at a more elevated position on our sliding scale. Likewise, laws which embody classification schemes that are more constitutionally suspect, such as laws discriminating against racial or ethnic minorities, are more strictly scrutinized. This approach was first announced in *State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978), where we stated:

> In applying the Alaska Constitution, however, there is no reason why we cannot use a single test. Such a test will be flexible and dependent upon the importance of the rights involved. Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective. Where fundamental rights or suspect categories are involved, the results of this test will be essentially the same as requiring a "compelling state interest"; but, by avoiding outright categorization of fundamental and

[13] The flexible scale we use resembles the "spectrum of standards" of which Justices Marshall and White have written with respect to federal equal protection. San Antonio Independent School District v. Rodriguez 411 U.S. 1 98-99, 36 L.Ed. 2d 16, 81 (Marshall, J., dissenting) *reh'g denied*, 411 U.S. 959, 36 L.Ed. 2d 418 (1973); Vlandis v. Kline, 412 U.S. 441, 458-59, 37 L.Ed. 2d 63, 75 (1973) (White, J., concurring). As Justice White has put it: "[I]t must now be obvious, or has been all along, that, as the Court's assesment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance or hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discrimination." *Id.*

> nonfundamental rights, a more flexible, less result-oriented analysis may be made.

(Footnote omitted).

Having selected a standard of review on the *Erickson* sliding scale, we then apply it to the challenged legislation. This is done by scrutinizing the importance of the governmental interests which it is asserted that the legislation is designed to serve and the closeness of the means-to-ends fit between the legislation and those interests. As the level of scrutiny selected is higher on the *Erickson* scale, we require that the asserted governmental interests be relatively more compelling and that the legislation's means-to-ends fit be correspondingly closer. On the other hand, if relaxed scrutiny is indicated, less important governmental objectives will suffice and a greater degree of over/or under inclusiveness in the means-to-ends fit will be tolerated. *Compare Vogler v. Miller,* 660 P.2d 1192 (Alaska 1983) *with Rose v. Commercial Fisheries Entry Commission,* 647 P.2d 154 (Alaska 1982). As a minimum, we require that the legislation be based on a legitimate public purpose and that the classification "be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation be based on a legitimate public purpose and that the classification "be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . ." *Isakson v. Rickey,* 550 P.2d at 362 (quoting *State v. Wylie,* 516 P.2d 142, 145 (Alaska 1973) ).

The individual interest asserted in Ostroskys' challenge to the transferability provisions of the Act is not of a high

[14] Other language in *Erickson* suggests that a balancing of the individual rights asserted against the state's objective is to take place as a process separate from the identification and application of the appropriate standard of review. *Id.* at 12. Such a process is neither useful nor necessary because the selection of the standard of review on the sliding scale reflects an assessment of the importance of the individual rights, and the standard when selected posits the degree of importance which the government objective must have and the required closeness of fit between the means used to achieve that objective and its achievement. Thus, balancing is inherent in the process of selection and application of the standard of review and is not itself a separate step.

order. The interest is that of obtaining the right to fish as a gear license holder by lottery or apprenticeship rather than by purchase or inheritance. The system advocated by the Ostroskys would exclude on the basis of one's ability to be hired as a crewman, a matter on which age and strength are often determinative factors, or on the basis of pure chance, while the present system exclude those who are unable to afford a permit and those who do not inherit one.

While the current system may thus discriminate on the basis of wealth, it does so only in the manner that any price does. As Professor Tribe has observed: "Judicial intervention to redress poverty on the basis of equal protection is therefore in constant danger of becoming either wholesale or unprincipled . . ."[15] This may be the reason why cases striking down fees for government supplied services or privileges as discriminating against the poor have been limited to instances where fundamental rights such as access to the courts,[16] and ballots[17] have been burdened.

An entry permit is a government license having value issued to a limited number of people. As such it resembles a liquor license, or a permit to operate a trucking firm over a given route, or a utility franchise, or a broadcast license. While these privileges are both purchasable and inheritable, the fact that the poor cannot buy them is wealth discrimination only in the general sense that all prices discriminate in a society where wealth is distributed unequally. Further, the fact that the poor seldom inherit such privileges is lineage discrimination only in the sense that laws permitting inheritance of anything of value are discriminatory. Since the wealth and lineage classifications presented here are not different from those which pervade our system of private property, we do not place the interest asserted by the Ostroskys—redistribution of entry permits based on a system free of these classifications—in an elevated position on the *Erickson* sliding

[15] L. Tribe, American Constitutional Law § 16-42 (1978).

[16] Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891 (1956).

[17] Bullock v. Carter, 405 U.S. 134, 31 L.Ed. 2d 92 (1972).

scale. It follows, of course that the rational basis test is the appropriate standard for this federal constitutional claim.

The state argues that free transferability serves the following objectives:

> —By making permits inheritable and transferable among family members, the Act ensures that a fishing family will be able to continue to fish if the permit holder dies or is disabled, thus protecting the family's source of income and its investment in vessel and gear. This prevents economic distress among fishermen and those dependent upon them for a livelihood.
>
> —By making it possible for a person who has fished one permit to purchase a different one, the Act allows fishermen to move to more profitable gear types, from hand troll to purse seine, for instance) and to fish a different area when their usual area has bad runs. This prevents economic distress among fishermen, and retains the traditional mobility . . .
>
> —By making permits salable, the Act creates a market for them. Price depends largely on the state of the fishery . . . Thus, in order to keep the fisheries healthy, fishermen will obey conservation laws, assist in the apprehension of violators of those laws and willingly contribute to aquaculture programs.
>
> —By giving permit holders an incentive—money—to transfer their permits, the Act prevents the creation of a closed class of fishermen . . . [T]he number of transfers to date has been very large.
>
> —By making the acquisition of a permit certain by payment of the purchase price, the Act allows fishermen to plan where they will fish, what type of gear they will use and what investments in vessels and gear they can prudently make.
>
> —By not setting up any complex eligibility formulas for new entrants, the Act makes the transfer system readily understandable to those it will affect.

> —By not requiring the Commission to get involved in transfers to an extent beyond the simple processing of transfer applications and the certification that the proposed transferee has the present ability to fish, the Act eases the Commission's administrative burden, and allows it to focus its attention on other necessary duties, such as the setting of optimum numbers for limited fisheries and the decision whether presently open fisheries should be limited.

Free transferability, in other words, is meant to prevent hardship when a permit holder dies or becomes disabled; allow gear license holder to move from one fishery or type of gear to another; advance the causes of conservation, aquaculture, and adherence to fish and game laws by giving gear license holders a stake in the resource; increase the number of permits that are transferred; and ease administrative burdens on the state.

The opinion of the superior court, and the arguments of the Ostroskys, focus not on the foregoing purposes but on those identified in *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255, 1265 (Alaska 1980), namely, (1) enhancing the economic benefit to fishermen; (2) conserving the fishery; (3) avoiding unjust discrimination in the allocation of a limited number of entry permits; and (4) administrative convenience. While the objectives identified by the state are by no means unrelated to those expressed in *Apokedak*, the latter should be understood to be the overall objectives of a limited entry system.

Once the decision to institute a limited entry system is made, the question of how entry permits are to be transferred necessarily must be answered. The purposes of the transfer method will not necessarily be identical to general purposes of limited entry. As we noted in *Apokedak*, 606 P.2d at 1264 & n 39:

> Seldom, if ever, will a statutory scheme, especially one as complicated as the Limited Entry Act, have a single monolithic purpose. The legislature usually acts with

a variety of purposes in mind and each of these purposes deserves judicial recognition.[39]

Each of the objectives identified by the state as purposes of free transferability was discussed in the extensive legislative hearings preceding passage of the Act. Thus, they may not be regarded as after the fact hypotheses. Further, the objectives are legitimate and they are fairly and substantially furthered by free transferability. We hold, therefore,that the equal protection clause of the state constitution is not violated by the transfer provisions of the Act.

The same analysis is applicable, and yields the same conclusion as to federal equal protection.

The judgment of the superior court is REVERSED.

RABINOWITZ, Justice, dissenting.

I

I agree with the majority's suggestion that the conflict in constitutional provisions in this case is properly resolved by allowing the legislature to adopt a system of limited entry, but only through the means which are least restrictive upon other rights guaranteed in the constitution. Beyond the statement of this principle, however, I cannot agree with the application given the less restrictive alternative test to the "free transferability" system implemented by AS 16.43.170(b) and 16.43.150(h).

Free transferability impairs rights guaranteed by three separate clauses of the Alaska Constitution. The "common use" clause in Article VIII, section 3 provides:

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

[39] This is not to say that the judiciary is required to hypothesize or invent purposes, something *Isakson's* intensified scrutiny test specifically rejects. Close examination of the statutory scheme will usually yield several concrete legislative purposes having a substantial basis in reality, even if these purposes are not specifically identified in a statutory purpose clause.

The first sentence of Article VIII, section 15 states:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

Finally, Article I, section 1 provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[1]

In the absence of legislation pursuant to the second sentence of Article VIII, section 15,[2] the "resource" of the gear fisheries is reserved to the people for common use. The common use clause necessarily contemplates that resources will remain in the public domain, and will not be ceded to private ownership. Since the right of common use is guaranteed expressly by the constitution, it must be viewed as a highly important interest running to each person within the state.[3]

The enabling language of Article VIII, section 15 makes some inroads upon the application of the common use clause to the gear fisheries. Any system of limited entry, no matter how it is effectuated, will at any one time exclude a portion of the population from the resource. This observation, however, does not warrant the further conclusion that the common use

---

[1] *See also* the "natural resources equal protection clause" in Article VIII, section 17.

[2] Article VIII, section 15, provides in relevant part:

> This section does not restrict the power of the State to limit entry into any fishery for purpose of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

As noted by the majority, without this enabling language the entire limited entry statute would likely be unconstitutional.

[3] I would hold that the state bears a high burden of showing the substantiality of its interests throughout our equal protection examination. Thus, I specifically disagree with the majority's conclusion that "[t]he transferability provisions of the Act is not of a high order." In addition to the common use clause, *see* Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1266 (Alaska 1980) ("important right to engage in economic endeavor"); *see also* Hilbers v. Municipality of Anchorage, 611 P.2d 31, 40 (Alaska 1980).

clause is rendered a nullity with respect to entry legislation. In my view, Article VIII, section 3 still mandates that limited entry be achieved through the least possible "privatization" of the common resource.

Examined in these terms, free transferability makes the Limited Entry Act the most restrictive scheme possible under the common use clause. The ability to use and derive value from the gear fishery resource is dependent upon possession of a gear license, and these licenses are designed to operate as private property. The initial "grantees" enjoy the ability to sell, assign, or pass on to their heirs their share of the gear fishery resource. Most importantly, the holder's right to the license never expires; the holder's heirs may hold it forever. Alternatively, they may sell it and realize a return based upon its value as an asset held in perpetuity. Under the free transferability system, none of the value of the resource is retained or ever returns to the state and the people.

In addition, I conclude that AS 16.43.170(b) and 16.43.150(h) create an "exclusive" right or "special privilege" within the meaning of Article VIII, section 15. Initial grantees were presented with a windfall at the expense of all other persons in the state. Public rights were extinguished in order to create exclusive private interests of sometimes enormous value. Under the equal protection clause, the populace was divided into two categories: those who would receive this great boon from the state, and those who would forever lose their share in the resource unless they someday "bought it back" through the purchase of a gear license.

Given the infringements upon the constitutional interests which I have described, free transferability would still be permissible under Article VIII, section 15 if it were necessary to a feasible system of limited entry. I believe, however, that the Ostroskys have presented a substantially less restrictive alternative that furthers all of the purposes which underlie free transferability.

The Ostroskys' principal objection to free transferability is that licenses never expire. One alternative they suggest is

that licenses should be issued only for a term of years, reverting to the state for redistribution upon expiration. In this way, the state would recapture control of the resource periodically and reassign it to the legislatively-determined appropriate recipients. Thus, the common resource would not be transferred forever to a discrete private class. The state and the people would have the recurring ability to allocate use rights.[4]

Under the proposed alternative, the length of the license term would be a matter for the discretion of the legislature, within constitutional limits. Article VIII, section 15, authorizes the state to create a limited entry scheme designed to "prevent economic distress among fishermen and those dependent upon them for a livelihood." This authorizes the state to define licenses in a way that makes it economically practical for license holders to fish. Given this authorization, the constitution recognizes that license may be granted for a sufficiently long period that the holder may be expected to recoup his investment in gear and vessel, and realize a reasonable return. Any license which goes beyond the level of reasonable economic attractiveness, and does so at the expense of the constitutional rights of others, is prohibited.

Similarly, the method of redistribution following expiration is also a matter of legislative choice, to be exercised within

[4] The Ostroskys' "free transferability plus expiration" alternative serves all of the purposes advanced in support of the existing scheme. The alternative "prevents economic distress among fishermen and those dependent upon them" by protecting the family's source of income during the life of the permit even if the original holder dies or is disabled. It retains the "traditional mobility" of fishermen by allowing for the sale of limited-term permits. It encourages conservation of the fisheries by license-holders, who still have a direct economic stake in the health of their fishery. It discourages the creation of a closed class of fishermen by making this impossible; transfers of permits are still encouraged by the possibility of sale for money. It allows for planning and prudent investment by making the acquisition of a permit certain by the payment of the purchase price. It does not unduly complicate the transfer scheme. It retains the feature of limited involvement in transfers on the part of the CFEC. The commission's burden is increased only in that it must periodically reissue the licenses. In my opinion, free transferability plus expiration advances all of the above state goals equally as well as does the existing scheme of free transferability minus expiration.

constitutional bounds. One proposal made by the Ostroskys is that reissuance should be made by lottery. This would prevent any danger of the licenses remaining in the hands of a closed class. Any plan which effectively guaranteed renewal would be subject to the same criticisms at the current free transferability plan.

The Ostroskys' suggestion does not actually require any change in the existing transferability scheme. Licenses may still be sold and inherited. The crucial difference is in the nature of the thing transferred. Licenses would resemble a lease interest in the resource as opposed to an outright ownership interest. They would still have value—possibly considerable value—and that value would be privately held. The distinguishing feature of free transferability with expiration is that something of the people's common use rights are still held by the state. Privatization of the common use interest is not effected to a degree well beyond what is necessary to implement an economically feasible limited entry system.

Because the Ostroskys have proposed an alternative for a feasible entry system which is less restrictive of the public's rights in the gear fishery resource, I would hold that the present statute is invalid under Alaska's Constitution.[5]

## II.

I further disagree with the majority's discussion of the state's interest in the goals furthered by AS 16.43.170(b) and 16.43.150(h). The court's opinion appears to dismiss the importance of the overall objectives of the limited entry statute to the equal protection scrutiny of transferability provisions. It is true that specific sections within a complex statute will be designed to serve narrow purposes subsidiary to the statute's larger goals. It is also true that these narrow purposes may properly be asserted by the state in attempting to meet its burden under the state equal protection clause. The legitimacy of these subsidiary purposes, however, is seriously

[5] Alternatively, I would order supplemental briefing in the case to allow the state to address the alternative of free transferability plus expiration.

undermined if they are found to conflict with the greater goals of the statutory scheme as a whole.

Under AS 16.43.010, the legislature has declared that "[i]t is the purpose of this chapter to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination." This statement of legislative intent does more than provide that one goal of the CFEA is to comport with the constitution. Decisions of this court have made it clear that the statute's policy of avoiding unjust discrimination extends further than to classifications forbidden by the constitution. *Commercial Fisheries Entry Commission v. Apokedak* 606 P.2d 1255, 1268 (Alaska 1980).

In evaluating the strength of the state's interest in the goals behind the system of free transferability, it is incumbent upon this court to weigh the Ostroskys' argument that the legislatively-created "free market" for gear licenses discriminates on the basis of wealth[6] I would hold that the broad statutory anti-discrimination purpose of the CFEA militates against any system of transferability which makes gear licenses available only to the extremely wealthy. Certainly the state's interest in the current transferability provisions is diminished by the provisions' tendency to create such a classification.

---

[6] I am also in disagreement with the court's observations that the Limited Entry Act discriminates on the basis of wealth only in the manner that any price does, and I further disagree that liquor licenses and utility franchises furnish appropriate analogues. These assumptions overlook the constitutional status of the right allocated by the Limited Entry Act and the fact that here the relevant "free market" is one which was created legislatively and one which perpetuates and aggravates economic disparities.

## APPENDIX II

IN THE SUPREME COURT OF THE STATE OF ALASKA

| | |
|---|---|
| STATE OF ALASKA<br>*Appellant,*<br>vs.<br>LORI L. OSTROSKY, JULIANNE OSTROSKY and HAROLD C. OSTROSKY,<br>*Appellees.* | No. 6336 |
| LORI L. OSTROSKY, JULIANNE OSTROSKY,<br>*Cross-Appellants,*<br>vs.<br>STATE OF ALASKA,<br>*Cross-Appellee.* | No. 6373 |

### CERTIFICATE OF SERVICE

COMES NOW Robert H. Wagstaff, a member of the Bar of the Supreme Court of the United States, and certifies that on August 31, 1983 he filed in open Court a Notice of Appeal to the Supreme Court of the United States herein, and personally served a member of the State District Attorney's Office. Additionally, on September 2, 1983, I caused to be mailed in the United States mail, postage prepaid, a copy of the Notice of Appeal to the Attorney General of the State of Alaska.

DATED this 2nd day of September, 1983, at Anchorage, Alaska.

ROBERT H. WAGSTAFF
Attorney for Ostroskys

Robert H. Wagstaff

IN THE SUPREME COURT OF THE STATE OF ALASKA

| | |
|---|---|
| STATE OF ALASKA<br>*Appellant,*<br>vs.<br>LORI L. OSTROSKY, JULIANNE OSTROSKY and HAROLD C. OSTROSKY,<br>*Appellees.* | No. 6336 |
| LORI L. OSTROSKY, JULIANNE OSTROSKY,<br>*Cross-Appellants,*<br>vs.<br>STATE OF ALASKA,<br>*Cross-Appellee.* | No. 6373 |

## NOTICE OF APPEAL

COMES NOW Robert H. Wagstaff, counsel for Appellees/Cross-Appellants LORI L. OSTROSKY, JULIANNE OSTROSKY, and HAROLD C. OSTROSKY, and gives notice of appeal to the Supreme Court of the United States from this Court's Opinion No. 2702 dated July 19, 1983. This appeal is taken pursuant to 28 USC 1257(2).

DATED this 2nd day of September, 1983, at Anchorage, Alaska.

ROBERT H. WAGSTAFF
Attorney for Appellees/Cross-Appellants

Robert H. Wagstaff

## APPENDIX III

**Sec. 16.43.010. Purpose and findings of fact.** (a) It is the purpose of this chapter to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination.

(b) The legislature finds that commercial fishing for fishery resources has reached levels of participation, on both a statewide and an area basis, that have impaired or threaten to impair the economic welfare of the fisheries of the state, the overall efficiency of the harvest, and the sustained yield management of the fishery resource. (§ 1 ch 79 SLA 1973)

**Sec. 16.43.020. Alaska Commercial Fisheries Entry Commission.** (a) There is established the Alaska Commercial Fisheries Entry Commission as a regulatory and quasi-judicial agency of the state. The commission consists of three members appointed by the governor and confirmed by the legislature in joint session.

(b) The governor shall designate one member of the commission as chairman of the commission. The member designated shall serve as chairman for a term of two years, and may be designated chairman for successive two-year terms. (§ 1 ch 79 SLA 1973)

**Sec. 16.43.140. Permit required.** (a) After January 1, 1974, no person may operate gear in the commercial taking of fishery resources without a valid entry permit or a valid interim-use permit issued by the commission.

(b) A permit is not required of a crewman or other person assisting in the operation of a unit of gear engaged in the commercial taking of fishery resources as long as the holder of the entry permit or the interim-use permit for that particular unit of gear is at all times present and actively engaged in the operation of the gear.

(c) A person may hold more than one interim-use or entry permit issued or transferred under this chapter only for the following purposes:

(1) fishing more than one type of gear;

(2) fishing in more than one administrative area;

(3) harvesting particular species for which separate interim-use or entry permits are issued. (§ 1 ch 79 SLA 1973)

**Section 16.43.150. Terms and conditions of entry permit: annual renewal.** (a) Each entry permit authorizes the permittee to operate a unit of gear within a specified administrative area.

(b) The holder of an entry permit shall have the permit in his possession at all times when engaged in the operation of gear for which it was issued.

(c) Each entry permit is issued for a term of one year and is renewable annually.

(d) Failure to renew an entry permit for a period of two years from the year of last renewal results in a forfeiture of the entry permit to the commission, except as waived by the commission for good cause. An entry permit may not be renewed until the fees for each preceding year during which the entry permit was not renewed are paid. However, failure to renew an entry permit in a year in which there is an administrative closure for the entire season for a specific fishery is good cause not to renew the entry permit. The commission shall waive the payment of fees for that year.

(e) An entry permit constitutes a use privilege which may be modified or revoked by the legislature without compensation.

(f) An entry permit survives the death of the holder.

(g) Except as provided in AS 16.10.333—16.10.337 and in AS 44.81.230—44.81.250, an entry permit may not be:

(1) pledged, mortgaged, leased, or encumbered in any way;

(2) transferred with any retained right of repossession or foreclosure; or

(3) attached, distrained, or sold on execution of judgement or under any other process or order of any court.

(h) Upon the death of an entry permit holder, the permanent permit shall be transferred by the commission directly to the surviving spouse by right of survivorship unless a contrary intent is manifested. When no spouse survives, the rights of the decedent pass as part of his estate. (§ 1 ch 79 SLA 1973; am §§ 1, 2 ch 73 SLA 1977; am § 6 ch 83 SLA 1978: am § 1 ch 51 SLA 1980; am § 2 ch 47 SLA 1981)

**Sec. 16.43.170. Transfer of entry permits.** (a) Entry permits and interim-use permits are transferable only through the commission as provided in this section and § 180 of this chapter and under regulations adopted by the commission.

(b) Except as provided in (c) of this section, the holder of an entry permit may transfer his permit to another person or to the commission upon 60 days notice of intent to transfer under regulations adopted by the commission. No sooner than 60 days nor later than 12 months from the date of notice to the commission, the holder of an entry permit may transfer his permit. If the proposed transferee, other than the commission, can establish present ability to participate actively in the fishery, the commission shall approve the transfer and reissue the entry permit to the transferee.

(c) If the number of outstanding entry permits for a fishery is greater than the optimum number of entry permits established under §§ 290—300 of this chapter, the holder of an entry permit who qualified for that entry permit in a priority classification designated under § 250(c) of this chapter may transfer his permit only to the commission. The transfer to the commission shall be made under the buy-back provisions of §§ 310—320 of this chapter.

**Sec. 16.43.250. Standards for initial issue of entry permits.** (a) Following the establishment of the maximum number of units of gear for a particular fishery under § 240 of this chapter, the commission shall adopt regulations establishing qualifications for ranking applicants for entry permits according to the degree of hardship which they would suffer by exclusion from the fishery. The regulations shall define priority

classifications of similarly situated applicants based upon a reasonable balance of the following hardship standards:

(1) degree of economic dependence upon the fishery, including but not limited to percentage of income derived from the fishery, reliance on alternative occupations, availability of alternative occupations, investment in vessels and gear;

(2) extent of past participation in the fishery, including but not limited to the number of years participation in the fishery, and the consistency of participation during each year.

(b) The commission shall designate in the regulations those priority classifications of applicants who would suffer significant economic hardship by exclusion from the fishery.

(c) The commission shall designate in the regulations those priority classifications of applicants who would suffer only minor economic hardship by exclusion from the fishery. (§ 1 ch 79 SLA 1973)

**Sec. 16.43.260. Applications for initial issue of entry permits.** (a) The commission shall accept applications for entry permits only from applicants who have harvested fishery resources commercially while participating in the fishery as holders of gear licenses issued under AS 16.05.536—16.05.670 before the qualification date established in (d) or (e) of this section.

(b) The commission shall establish the opening and closing dates, places and form of application for entry permits for each fishery. The commission may require the submission of specific verified evidence establishing the applicant's qualifications under the regulations adopted under § 250 of this chapter.

(c) When an applicant is unable to establish his qualifications for an entry permit by submitting the specific verified evidence required in the application by the commission, he may request and obtain an administrative adjudication of his application according to the procedures established in § 110(b) of this chapter. At the hearing he may present alternative evidence of his qualifications for an entry permit.

(d) Except as provided in (e) of this section, an applicant

shall be assigned to a priority classification based solely upon his qualifications as of January 1, 1973.

(e) When the commission established the maximum number of entry permits for a particular fishery under § 240 of this chapter after January 1, 1975, an applicant shall be assigned to a priority classification based solely upon his qualifications as of January 1 of the year during which the commission establishes the maximum number of entry permits for the fishery for which application is made. (§ 1 ch 79 SLA 1973; am § 3 ch 126 SLA 1974)

**Sec. 16.43.360. Penalties.** (a) A person who violates a provision of this chapter or a regulation promulgated under this chapter, upon conviction, is guilty of a misdemeanor and is punishable by a fine of not more than $5,000 for a first conviction; a fine of not more than $10,000 for a second conviction; and, for a third conviction, a fine of not more than $10,000 as well as forfeiture of all interim-use permits and entry permits held by him and permanent loss of eligibility for interim-use permits or for entry permits.

(b) A person who makes a false statement of a material fact in the application for an interim-use permit or an entry permit or in the application for a transfer under §§ 170—180 of this chapter, or a person who assists another by making a false statement of a material fact in support of the other person's application for issuance of an interim-use permit or an entry permit or transfer of an entry permit, upon conviction, is guilty of a misdemeanor and shall forfeit all interim-use permits and entry permits held by him and shall lose eligibility for interim-use permits and for entry permits for a period of five years.

(c) If a permit holder is convicted of a violation of AS 43.20.335 and the violation relates to income derived from commercial fishing under this title, he shall forfeit all interim-use permits and entry permits held by him and shall lose eligibility for interim-use permits and for entry permits for a period of five years.

(d) If a permit holder is charged by the state with violating a provision of this chapter or a regulation adopted under this chapter, he may not transfer, under § 170 of this chapter, any interim-use or entry permit he may hold, until after the final adjudication or dismissal of the charges. (§ 1 ch 79 SLA 1973; am § 7 ch 73 SLA 1977)